UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

EL PASO DISPOSAL, L.P.,	
Respondent,	28-CA-21654 28-CA-21666
and	28-CA-21672 28-CA-21677
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351, AFL-CIO,	28-CA-21681
Charging Party,	
EL PASO DISPOSAL, L.P.,	
Employer,	
and	
PAUL URBINA,	28-RD-969
Petitioner,	
and	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351, AFL-CIO	

RESPONDENT'S ANSWERING BRIEF
TO GENERAL COUNSEL'S CROSS EXCEPTIONS

Charles P. Roberts III
Constangy, Brooks & Smith, LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101
(336) 721-6852
(336) 748-9112 (facsimile)

Mark R. Flora
Constangy, Brooks & Smith, LLP
98 San Jacinto Boulevard
Suite 615
Austin, Texas 78701
(512) 382-8800
(512) 382-8801 (facsimile)

PDF created with pdfFactory trial version www.pdffactory.com

TABLE OF CONTENTS

PDF created with pdfFactory trial version www.pdffactory.com

PDF created with pdfFactory trial version www.pdffactory.com

TABLE OF CASES AND AUTHORITIES

PDF created with pdfFactory trial version www.pdffactory.com

PDF created with pdfFactory trial version www.pdffactory.com

RESPONDENT'S ANSWERING BRIEF
TO GENERAL COUNSEL'S CROSS-EXCEPTIONS

El Paso Disposal, LP, Respondent herein files its Answering Brief to General Counsel's Cross-Exceptions as follows:

INTRODUCTION

On June 30, 2009, Respondent filed its exceptions and supporting brief to the April 27, 2009 Decision of Administrative Law Judge Burton Litvak. On July 14, 2009, the General Counsel filed its answering brief, as well as limited cross-exceptions and a supporting brief.

The General Counsel raises the following contentions in his cross-exceptions:

1. The ALJ erred in failing to find surface bargaining by Respondent.
2. The ALJ erred by failing to analyze the General Counsel's alternative theory that if the strike were found to be an economic strike, Respondent failed to recall strikers to all of the *Laidlaw* vacancies.
3. The ALJ erred in failing to find that Respondent unlawfully discharged Juan Castillo.
4. The ALJ erred by failing to include in the Conclusion of Law section his finding that respondent violated the Act by requiring strikers to sign a preferential hire list.
5. The ALJ erred in failing to order that backpay be computed on a compounded quarterly basis.

PDF created with pdfFactory trial version www.pdffactory.com

MATERIAL FACTS AND ARGUMENT

A. RESPONDENT BARGAINED IN GOOD FAITH

Respondent has excepted to the ALJ's findings and conclusions that by "[d]uring its bargaining with the Union for its maintenance employees, by engaging in dilatory tactics regarding the scheduling of bargaining sessions, failing and refusing to meet regularly with the Union and at reasonable intervals, unreasonably limiting the duration of negotiating sessions, failing to designate an agent with sufficient bargaining authority, refusing to accede to a dues checkoff provision, and imposing a premature last, best, and final offer on the Union, at a time when the parties had not yet engaged in bargaining on several subjects, Respondent failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act." (JD 72: 25-33). These findings and conclusions are wholly unsupported by the record and established law. The General Counsel has taken a cross-exception to the ALJ's failure to find that Respondent engaged in unlawful surface bargaining. This cross-exception lacks merit and should be rejected.

1. Background

On September 28, 2006 the Union was certified as the exclusive bargaining representative for Respondent's El Paso maintenance employees. (GC Exh. 8). On October 12, 2006, the Union was certified as the exclusive bargaining representative for Respondent's El Paso drivers. (GC Exh. 10).

By letters dated October 2, 2006, Business Representative Victor Aguirre requested certain information and that the parties meet to bargain a contract. (GC Exhs. 90, 91). By letter dated October 12, 2006, Respondent's Executive Vice President and Chief Operating Officer Darrell Chambliss responded and indicated that Respondent would furnish the requested

PDF created with pdfFactory trial version www.pdffactory.com

information as soon as reasonably possible and would get back to Aguirre on dates to bargain. (GC Exh. 92).

On October 16 Aguirre responded and indicated that he understood the need for additional time to respond to the Union's information request. Aguirre stated that he would like to meet at the Union's offices. He further indicated that he had notified the FMCS. (GC Exh. 93).

By letter dated October 20, 2006 to Aguirre, Respondent's counsel and designated chief negotiator, Kenneth Carr, provided certain information previously requested by Aguirre. Carr further advised Aguirre that on the previous afternoon he had been advised by the Governor's office that he had been selected to fill a vacancy on Texas' 8th District Court of Appeals. Carr indicated that Respondent would be selecting a new chief negotiator, who would be in contact with Aguirre. (GC Exh. 67, Tr. 91-92).

Carr's letter was sent to the address that Aguirre had used in his correspondence. The Union, however, had relocated and this letter apparently was not received in a timely fashion. In an e-mail dated November 1 to Chambliss, Aguirre inquired as to the status of the information request response. Chambliss responded on November 5, and expressed surprise that Aguirre had not received a package from Carr. Chambliss indicated that the package would be sent overnight delivery on November 6, 2006. (GC Exh. 94). Aguirre did in fact receive this package on November 7, 2006. (Tr. 636).

On November 11, Aguirre e-mailed Chambliss and made a supplemental request for information. On November 12, Chambliss responded that the Company would attempt to provide the additional information by the requested December 1 date. Chambliss stated that the Company was still interviewing attorneys to replace Carr and hoped to have a decision by November 20, 2006. Aguirre responded later that day without objection. (GC Exh. 100).

PDF created with pdfFactory trial version www.pdffactory.com

Subsequently, Respondent hired attorney Mark Flora to serve as chief negotiator. (Tr. 78). Flora attempted to contact Aguirre by phone, but the telephone number he had was constantly busy. On November 28, 2006, Flora sent Aguirre an e-mail advising him that Flora would be Respondent's chief negotiator and providing his contact information. (GC Exh. 26).

Aguirre did contact Flora, and on November 29, 2006, sent Flora an e-mail apologizing for the fact that the Union had used old correspondence with an old address and contact information. Aguirre offered December 8, 11-15, and 18-21 as possible dates to meet. (GC Exh. 27). The next day, November 30, 2006, Aguirre sent Flora the following e-mail;

> I just found out today that I am going to have to make my round meetings in San Antonio the week of December 11th through 16th. Can you please amend the list of proposed dates for meetings to reflect such changes? Thanks. Since I'll be closer to your area, if you wish to meet around the San Antonio area that week please let me know to look at my schedule while I am down there. Thanks for your time and understanding.

(GC Exh. 28).

Flora responded to Aguirre's email later the same day:

> Victor – As I earlier indicated, I am still set for trial on the 11th of this month so I have not had much opportunity to get involved w/El Paso Disposal. That is the week you will be in San Antonio. If my case settles I could meet w/you anytime that week, or if it goes, late that week. I will be taking a number of vacation days the last two weeks of the year. What I would propose is an introduction meeting in San Antonio one day the week of the 11th, depending on my trial. We could then compare calendars and select some tentative dates in January to get the ball rolling. Let me know. Mark.

(GC Exh. 28).

On December 4, 2006, Aguirre sent Flora an e-mail thanking him for forwarding certain information and attaching a follow-up request for information that Aguirre had previously sent on November 11, 2006 to Darrell Chambliss. Flora responded by e-mail on December 5 and

PDF created with pdfFactory trial version www.pdffactory.com

promised to look into the matter. He also asked: "Any chance we could meet when you are over here in San Antonio? I would drive down there if you are available." (GC Exh. 29).

Flora did in fact drive to San Antonio and meet with Aguirre and Juan De la Torre in mid-December 2006. (Tr. 87-88). The parties met in a hotel lobby and introduced themselves. Flora inquired as to the issues that had led to employees selecting the Union as their representative. The parties also discussed general availability. (Tr. 87-88).

At some point, the parties agreed on two bargaining dates in December 2006, but the Union subsequently cancelled because of a conflict. (Tr. 85-86). The parties eventually mutually agreed to meet on January 30. (GC Exh. 30, 33).

On January 5, Aguirre sent Flora an e-mail complaining of certain alleged unilateral changes in benefits. (GC Exh. 31). Flora investigated these allegations and responded in detail on January 29. (GC Exh. 32).

On January 22, Flora sent Aguirre an e-mail again confirming January 30 and invited him to bring any Union proposals that had been prepared to the meeting. (GC Exh. 34). On January 30, the parties met in El Paso, Texas. The Union's bargaining committee consisted of Victor Aguirre, Union Business Agent, Juan De la Torre, Union Organizer, and employees Juan Castillo, Hector Hernandez and Eduardo Holguin. Respondent's bargaining committee consisted of Flora, George Wayne (Divisional Vice President), Gene Dupreau (Western Region Vice President), and Armando Lopez (Operations Manager). (Tr. 95-96).

2. <u>January 30</u>

On January 30, after formalities and introductions, the parties agreed that they would bargain concerning the maintenance unit first, before turning their attention to the driver's unit; and they would bargain the economic issues last. (Tr. 88, 96-97). The Employer inquired as to

PDF created with pdfFactory trial version www.pdffactory.com

the general reasons for the successful organization of El Paso Disposal and the Union responded that favoritism, lack of attention from the corporate office, bad supervision, and constantly changing rules all played a factor in the Union's success. The Union passed proposed contract language covering Recognition, Scope, Grievance and Arbitration, No Strike-No Lockout, Dues Check-Off, Seniority, Hours of Work and Overtime, Probationary/Temporary Employees, Discipline and Discharge, Drug-Free Workplace, Union Visitation Rights, Bulletin Boards, Job Postings, Non-Discrimination, Jury Duty, Leave of Absence, Savings Clause, Captions, and Terms and Duration of Agreement. Flora inquired as to whether the Union intended to submit a proposed article concerning Shop Stewards. Aguirre replied that he would do so before the next meeting. Because it was seeing the Union's proposals for the first time, the parties broke early to allow the Company time to consider these proposals and prepare responses. The parties agreed to meet next on February 13. (GC Exhs. 5, 12, Tr. 101-102, 561-563).

3. <u>February 13</u>

On February 6, the Union submitted its language regarding Stewards as promised, (GC Exh. 35), and on February 13, the parties again met. Respondent responded to the Union proposals of January 30, and then passed new or responsive proposed language for articles concerning the Preamble, Recognition, Complete Agreement, Management Rights, Non-Discrimination, Hours of Work, Merit Shop, Introductory Period, Alcohol and Substance Abuse Policy and Discipline and Discharge. The parties discussed the various proposals before addressing three personnel issues involving union members. (GC Exhs. 5, 12, Tr. 107-108).

Late in the day on February 13, after the parties had broken, Aguirre sent Flora an e-mail detailing a number of dates he had available in March and April to meet. (GC Exh. 36). Subsequently, Aguirre advised Flora that the week of March 5-9 that had previously been listed

PDF created with pdfFactory trial version www.pdffactory.com

as available was no longer open. On February 19, Flora advised Aguirre by e-mail that Respondent could meet on March 22 and April 10. Flora indicated that he would "have written counter-proposals ready for each of your proposals so hopefully we can move ahead quicker." The parties agreed to these dates without objection from the Union and agreed to meet at 9:00 a.m. and go the full day. (GC Exhs. 36, 37, 38, Tr. 111-113).

4. March 22

The parties again met on March 22. On that date the parties discussed the previously passed proposals, as amended, and signed tentative agreements on Preamble (Article 1), Recognition (Article 2), Non-Discrimination (Article 5), Alcohol & Substance Abuse (Article 9), Jury Duty (Article 15), Union Visitation Rights (Article 16), Separability & Saving Clause (Unnumbered article), and Duration (Unnumbered article). (GC Exh. 24). The Union passed one new proposal, Economic Equalization, and two amended responsive proposals, Complete Agreement and Management Rights. (GC Exh. 14). Respondent passed new or responsive proposals on Safety and Health, Job Posting, Discretionary Unpaid Leave of Absence, Jury Duty, Union Visitation Rights, Department of Transportation, Lay offs, General Work Rules, Shop Steward, Grievance and Arbitration, and No Strike/No Lockout. The Company's grievance proposal included a 60-day cap on backpay. The parties agreed to meet again on April 10 and 17. (GC Exhs. 5, 15, 68).

5. April 10

On March 23, the Union e-mailed to Respondent its initial Economic proposals for the mechanics unit. (GC Exh. 39). The proposals contained articles concerning Uniforms, Vacations, Funeral Leave, Longevity Bonus, Incentives, Fringe Benefits, Severance Payments, Sick Leave, and Holidays. The fringe benefits proposal attached an Appendix B, which was a photocopy of a

PDF created with pdfFactory trial version www.pdffactory.com

summary of Respondent's existing benefits. (GC Exh. 16). On March 29, Flora notified Aguirre that George Wayne had been called for jury duty on April 17 and that Respondent would look for further dates. (GC Exh. 39).

At the April 10 meeting, Respondent passed its Attendance proposal. Much of the day, however, was spent discussing micro issues raised by the Union such as individual supervisors, welding masks, use of radios and availability of coffee, as well as macro issues such as the need for commercial drivers licenses (CDL's) and the distribution of overtime offers. Respondent provided the Union detailed overtime records requested in support of its position that the overtime was being uniformly distributed. After lunch the parties reviewed and discussed the Union's Economic proposals. Of note is a discussion that took place between Aguirre and Wayne. Aguirre stated that the Company was not paying Longevity Bonuses and was not following its "policy." He inquired whether the Company had done away with the bonuses. Wayne responded that policy language provides that the bonuses will be distributed by the CEO at year end and that the Company would follow the policy language. Additional discussions/argument ensued and the parties moved on to other economic issues. (GC Exhs. 5, 69, 89, Tr. 122-127).

6. <u>May 22</u>

On April 17, Flora sent Aguirre an e-mail indicating that he would be forwarding a safety proposal the following week and proposing May 22 and May 31 as the next dates for bargaining. (GC Exh. 40). On May 3, Aguirre sent Flora an e-mail stating that the mechanics and drivers were becoming impatient, that some were suggesting disruptive behavior, and asking that the process be speeded up with more days, as well as consecutive days. Aguirre also raised certain allegations regarding Maintenance Manager Mike Olivas. Flora responded on May 7, and

PDF created with pdfFactory trial version www.pdffactory.com

indicated that the Company was looking into the allegations regarding Olivas. Flora stated that first contracts often take time to negotiate and that progress was being made, and he asked Aguirre to discourage any disruptive behavior. Flora indicated that he would discuss the Union's scheduling concerns when the parties met on May 22. (GC Exh. 41).

At the May 22 meeting, the parties made considerable progress. They signed tentative agreements on Merit Shop (Article 7), Introductory Period (Article 8), Safety & Health (Article 12), Job Posting (Article 13), Discretionary Unpaid Leave (Unnumbered Article), Department of Transportation (Unnumbered Article), and Layoffs (Unnumbered Article). (GC Exhs. 5, 24).

7. May 31

The parties next met on May 31. They discussed various proposals of both parties, including Complete Agreement, Hours of Work, Management Rights, Attendance, and Work Rules. They signed a tentative agreement on Shop Stewards (Unnumbered Article). (GC Exhs. 5, 24). The parties mutually agreed to meet on June 28, July 17, and August 2. (GC Exh. 6, p. 5).

8. June 28

At the June 28 meeting, the parties discussed various proposals, including Discipline & Discharge, Complete Agreement, Grievance/Arbitration, Checkoff, Hours of Work, and Overtime Equalization. (GC Exh. 5). Respondent agreed to add progressive discipline language, to apply consistent guidelines on phones, and to include FMCS language in the grievance/arbitration article. Much of the day, however, was devoted to discussing the termination of Ruben Calzada. (GC Exh. 5, 43, 69).

At the conclusion of this meeting, the only unresolved non-economic issues were Complete Agreement, Hours of Work, General Work Rules, and four linked proposals. The Union had indicated that it would agree to the Management Rights proposal, but only in exchange for Dues

PDF created with pdfFactory trial version www.pdffactory.com

Checkoff. The Union also was in agreement with the No Strike/No Lockout proposal, but only if the backpay cap were eliminated from the Grievance/Arbitration proposal. (GC Exh. 6, p. 6).

9. July 17

The parties next met on July 17 and bargained throughout the day concerning Hours of Work, Grievances/Arbitration, Discipline/Discharge, Work Rules, Dues Check-Off, and Management Rights. Respondent provided revised proposals and continued to revise the language throughout the day in an attempt to reach resolution. At the end of the day the language gap was significantly narrowed and the parties agreed to sign off on several proposals at the next meeting. The Union also agreed to submit arbitration acceleration and mediation language. The parties mutually agreed to meet again on August 9 and 29. (GC Exhs. 5, 18, 69).

10. August 9

The meeting of August 9 was extremely productive. At the beginning of the meeting, Aguirre commented that the Company had always been reasonable, except perhaps for its position on the 60-day backpay cap. (Tr. 253-254). Respondent once again passed revised Attendance, Grievance/Arbitration, Hours of Work and Discipline/Discharge language to the Union. After discussion, all of the aforesaid revised provisions were signed off but for Grievance/Arbitration. In addition, Work Rules and Complete Agreement were also signed off, leaving only the four linked non-economic provisions to be resolved: Grievance/Arbitration-No Strike/No Lockout and Management Rights- Dues Check-Off. The parties also agreed to meet on September 11 (in addition to the August 29 date already set). (GC Exhs. 5, 6, 19, 24, 69).

11. August 29

Between August 9 and 29, the parties exchanged a series of e-mails and telephone calls regarding the suspension of Mario Ortiz. The meeting on August 29 began with a contentious

PDF created with pdfFactory trial version www.pdffactory.com

discussion concerning Ortiz' situation. The discussion grew increasingly heated and set the tone for an unproductive day. Other individual issues discussed included controversial supervisor Eloy Gardea and Francisco Javier Gonzalez' sick leave. When the discussion finally turned to contract negotiation, the parties devoted most of their time to the Grievance/Arbitration and Dues Checkoff proposals, with various alternatives being considered but rejected. Aguirre stated that the Union was very frustrated and would have to consider its options. (GC Exhs. 5, 6, 69).

12. <u>September 11</u>

When the parties met on September 11, the Union brought up again the Ortiz suspension. Respondent advised that it had not received the documentation from Ortiz that had been requested. After checking with its office, the Union acknowledged this fact. Respondent passed a revised grievance proposal that increased the backpay cap from 60 to 90 days. Future scheduling was discussed, with the parties agreeing to October 4 and 24. Aguirre then stated that the membership, including the Driver Unit, had met and voted unanimously to strike. Flora inquired as to how or why the drivers would strike as the Union had never requested to meet to discuss them. The Union gave no answer to the question. The parties then agreed to hold the last four unresolved non-economic items and turn their attention to the Union's economic demands. (GC Exh. 5).

The parties then discussed in detail the Union's proposals for Uniforms, Vacations, Funeral Leaves, Longevity Bonuses, Incentives, Fringe Benefits, Severance Payments, Sick Leave, Holidays, and Wages. The parties broke for lunch and consideration of the proposals. When they reconvened Respondent responded with revised language to the proposals on Funeral Leave, Uniforms, Holidays, and Sick Leave. (GC Exhs. 5, 6, 69).

PDF created with pdfFactory trial version www.pdffactory.com

13. October 4

The parties next met on October 4. In addition to the usual participants, Randy Griffin, Regional Business Manager for the Union, was present, as well as Pete Cinquemani, a federal mediator with FMCS. After reviewing the status of negotiations for the benefit of Griffin and Cinquemani, Respondent revised its grievance proposal to increase the back pay cap to 120 days. Respondent then passed revised language to various economic proposals and responded orally to several others. The parties bargained throughout the day and signed a tentative agreement on Bereavement Leave (Unnumbered Article). The Union's Benefit and Wage proposals were reviewed in detail. Respondent informed the Union that the Union's benefit proposal (Company pay 90%) would increase costs by 65% and its wage proposal would result in a 21% immediate increase. The Union contended that the increase was necessary to correct years of favoritism and under payment, while Respondent contended that its current wage structure was competitive as attested to by the fact that no one left unless terminated. Respondent offered 1% across the board. A discussion ensued concerning whether Respondent understood the employees' problems and needs, and the Union suggested that Gene Dupreau meet with the employees. The Union agreed not to file charges related to such meetings. The parties agreed to meet again on October 12 meeting. (GC Exhs. 5, 6, 24, 69).

14. October 12

On October 5 the Union submitted a revised Wage proposal. (GC Exh. 44). On October 12 the parties met and agreed to finally resolve the Ortiz situation. Turning their attention to contract negotiations, Respondent passed revised language on a number of economic issues which were then reviewed. Respondent noted that the Union's revised wage proposal would involve an immediate cost increase of 20.6%. Respondent increased its wage proposal to 1.25%

PDF created with pdfFactory trial version www.pdffactory.com

for each year. At some point during the day the Union reduced its wage demand to 18.2% and the parties settled several other economic articles. In addition, throughout the day the parties moved closer as well on a number of other open issues. At the close of the day it was agreed that enough progress had been made that Respondent should present a Last, Best and Final Offer at the next meeting scheduled for November 13. (GC Exhs. 5, 6, 69).

15. <u>November 13</u>

On November 13 the full committees convened with Cinquemani also present. Respondent passed its Last, Best and Final Offer and Cinquemani reviewed the status. Turning through the 32-Article Offer, Cinquemani correctly noted that 23 articles, 1-4, 6-20, 25 and 26 and 31 and 32 had been agreed to and signed off. Articles 5, 27 and 28, Management Rights, Grievance/Arbitration, No Strike/No Lockout and Dues Check-Off had been discussed at length and the Union's position remained unchanged that a quid pro quo exchange was necessary. The remaining six unresolved articles dealt with wages and benefits. At the close of Cinquemani's summary, Aguirre stood and loudly announced, "these guys don't think we will strike their ass." The Union then left the room. (GC Exhs. 5, 25).

Cinquemani remained and reviewed the open wage and benefit articles with the Respondent. He then met with the Union. He later returned and indicated that in order to get a "deal" the Union needed the following:

a) 5 days of Sick Leave annually;

b) a 365 day cap on back pay;

c) Dues Check-Off;

d) an immediate ratification bonus of $1,000.00; and

PDF created with pdfFactory trial version www.pdffactory.com

e) a 5% wage increase in the first and second years of the contract. He did not know concerning year 3.

Cinquemani then left again. After consideration, Respondent asked him to return and responded that it was prepared to offer the Union the requested 5 days of Sick Leave and increase the back pay cap to 150 days. He then left to speak with the Union. Cinquemani returned a short time later and indicated "no agreement." (GC Exh. 5). Later that same day, at or about 3 p.m., the Union mailed George Wayne its "Official Information Requests" covering 50 areas of alleged concern and containing approximately 300 subparts. In its transmittal correspondence, the Union requested that the Employer respond no later than November 27.

16. <u>The Strike – November 21</u>

The Union went on strike at 12:01 a.m. on November 21. There were 26 employees in the Maintenance Unit and 29 employees in the Drivers Unit who participated in the strike. Respondent learned of the impending strike several hours before the strike began when the Union issued an informational press release. All of the striking employees were permanently replaced between November 22 and 27.

At some point during the strike, speaking through Cinquemani, the parties agreed to again meet on December 4. At that meeting each side met separately with Cinquemani. Darrell Chambliss, Chief Operating Officer for the Employer, spoke on the Employer's behalf. In response to Cinquemani's questions, Chambliss indicated that the Respondent had permanently replaced the striking employees and that its Final Offer of November 13 was still available.

Cinquemani then met separately with the Union. He returned sometime later and indicated that the Union would come off some of their positions but that reinstatement of the strikers was necessary. Respondent replied that the permanent replacements had been hired in

PDF created with pdfFactory trial version www.pdffactory.com

good faith and at great expense, and that the strikers would be put on a preferential recall list. No agreement was reached and the parties left.

Later that same afternoon, the Union e-mailed to the Respondent an unconditional offer to return to work.

17. ARGUMENT

The Act compels good faith bargaining, not agreement, and the failure to reach an agreement is not indicative of bad faith. Surface bargaining, however, is a course of conduct marked by the absence of a "sincere desire" to negotiate the parties' differences and arrive at a contract. The Board looks at the totality of circumstances, including "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meeting[s]." *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). Allegations of surface bargaining against one party cannot be evaluated without reference to the other party's conduct, *Flying Foods, Group, Inc.,* 345 NLRB 101 (2005), *enf'd,* 471 F.3d 178 (D.C. Cir. 2006), and when the union takes an intransigent position regarding its own proposal, it cannot be heard to complain that the employer takes an equally firm position with regard to its proposal. *Unocal Apparel, Inc.,* 208 NLRB 601, n.1 (1974), *enf'd,* 508 F.2d 1368 (5th Cir. 1975).

"From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower,* 271

PDF created with pdfFactory trial version www.pdffactory.com

NLRB 1600, 1603 (1984). An employer is free to bargain hard for an agreement it deems "favorable to itself" and "[i]t is well settled that working toward such an end evinces not surface but hard bargaining." *Litton Systems,* 300 NLRB 324, 330 (1990), *enf'd,* 949 F.2d 249 (8th Cir. 1991).

Although the Board, in assessing surface bargaining allegations, examines the totality of a party's conduct, including unlawful conduct occurring away from the bargaining table, the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." Instead, "away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party's conduct at the bargaining table itself indicates an intent [not] to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining." *Id.; accord, St. George Warehouse, Inc.,* 341 NLRB 904, 907 (2004), *enf'd,* 420 F.3d 294 (3d Cir. 2005). Where the misconduct away from the table does not appear to influence the course of bargaining at the table, it lacks significant probative value. *Flying Foods, Group, Inc.,* 345 NLRB 101 (2005); *River City Mechanical,* 289 NLRB 1503, 1505 (1988).

While the Board has authority to examine the parties' substantive proposals in order to determine whether they demonstrate intent to thwart agreement, this is a slippery slope. "[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American National Insurance Co.,* 343 U.S. 395, 404 (1952). It cannot judge the merits of any proposal or declare a proposal to be "unacceptable," unless of course the proposal is facially unlawful. The Board's inquiry into substantive proposals must be limited to an inquiry as to whether the proposal was made or insisted upon because the party honestly was desirous of achieving such a provision

PDF created with pdfFactory trial version www.pdffactory.com

(good faith) or was used merely to create an impediment to an agreement (bad faith). "That we will read proposals does not mean, however, that we will decide that particular proposals are either 'acceptable' or 'unacceptable' to a party." *Reichhold Chemicals, Inc.,* 288 NLRB 69, 69 (1988), *enf'd pert. part,* 906 F.2d 719 (D.C. Cir. 1990).

The Supreme Court as early as 1952 explicitly rejected the notion that the Act compelled bargaining for fixed, as opposed to discretionary, terms of employment. Rejecting the Board's prior position that an employer's insistence upon a management functions clause was unlawful, the Court explained:

> The Board was not empowered so to disrupt collective bargaining practices. . . . Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

NLRB v. American Nat, Ins. Co., 343 U.S. 395, 408-409 (1952).

Here, the record contains none of the obstructive type of conduct that characterizes surface bargaining. To the contrary, it clearly demonstrates that Respondent has been bargaining in good faith. It met regularly with the Union, made proposals and counterproposals, compromised on numerous articles, and reached agreement on all but a handful of issues. The issues that separate the parties have been discussed at length, and a federal mediator has assisted in the process. The parties, however, despite their best efforts, have not yet been able to reach a complete agreement. This "inability to reach an agreement in no way indicates a failure to bargain in good faith." *NLRB v. Alva Allen Industries,* 369 F.2d 310, 318 (8th Cir. 1966). Further,

PDF created with pdfFactory trial version www.pdffactory.com

Respondent did not declare impasse and offered to return to the bargaining table. The Union has not pursued that option.

The allegation that Respondent made "predictably unacceptable" proposals is at odds with Board law. The Board simply does not judge the acceptability of a party's proposals. "That we will read proposals does not mean, however, that we will decide that particular proposals are either 'acceptable' or 'unacceptable' to a party." *Reichhold Chemicals, Inc.,* 288 NLRB 69, 69 (1988), *enf'd pert. part,* 906 F.2d 719 (D.C. Cir. 1990), *accord, Aztec Bus Lines, Inc.,* 289 NLRB 1021, 1024 (1988).

The Board's closely analogous decision in *Commercial Candy Vending Division,* 294 NLRB 908 (1989) is instructive. There, the Board rejected the ALJ's finding that the employer had bargained in bad faith by making "predictably unacceptable" proposals. In doing so, the Board explained:

> The judge found that the Respondent's management-rights clause proposal indicated a bad-faith bargaining posture. It is not unlawful for an employer to propose and bargain concerning a broad management-rights clause. The Board has found bad-faith bargaining when the employer has insisted on a broad management-rights clause and a no-strike clause, while at the same time refusing to agree to an effective grievance procedure. The Respondent's proposal, however, did not except its exercise of management rights from the purview of the grievance procedure. Nor can it be said that it was refusing to agree to an effective grievance procedure.
>
> That the Respondent made final agreement on union-security and dues-deduction provisions contingent on the Union's acceptance of its package deal does not establish that it engaged in surface bargaining. The judge found the Respondent's failure to include the dues-checkoff provision in its final offer was indicative of its intent to avoid reaching agreement, discrediting the Respondent's chief negotiator's testimony that such failure was inadvertent. The Respondent was not required to agree to the dues-checkoff provision; even so, it is clear from its handwritten proposal of September 24, 1982, that the Respondent meant to include the provision as part of its final package offer.

PDF created with pdfFactory trial version www.pdffactory.com

. . . .

> This review of the Respondent's bargaining positions amply demonstrates that they were not clearly designed to frustrate agreement on a collective-bargaining contract. The Respondent modified, redrafted, and withdrew proposals in major areas in response to concerns expressed by the Union. It also put forth legitimate business rationales and justifications in support of many of the changes it sought. While setting forth the Respondent's initial proposal in great detail, the judge failed to consider adequately the Respondent's subsequent movement relative to those proposals.

Id. at 910.

Ironically, several of the proposals deemed "predictably unacceptable" by the General Counsel were actually accepted by the Union: Merit Shop and Discipline & Discharge. Even Respondent's Management Rights proposal was accepted by the Union, subject only to an agreement being reached on Dues Checkoff. The Board and the courts have held that an employer may take a firm position with regard to Management Rights, Union Security, and Dues Checkoff. *KFMB Stations,* 349 NLRB No. 38 (2007); *Logemann Brothers, Co.,* 298 NLRB 1018, 1020 (1990), *Commercial Candy Vending Division,* 294 NLRB 908, 909 (1989). As the Seventh Circuit stated:

> Union security and checkoff are mandatory subjects of bargaining, and "(a) party ... is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party". *NLRB v. Advanced Business Forms Corp.,* 474 F.2d 457, 467 (2d Cir. 1973).

Atlas Metal Parts Co. v. NLRB, 660 F.2d 304, 308 (7th Cir. 1981).

Here, Respondent sought alternatives to Dues Checkoff and always indicated that it was rejecting the proposal "at this time." It is not at all unusual for employers to hold on Dues Checkoff until the very end of negotiations and to offer it at the last minute in exchange for

PDF created with pdfFactory trial version www.pdffactory.com

something important to the employer. Here, the Union never got close enough on economics to warrant using this bargaining chip.

The General Counsel's contention that Respondent's wage proposal was "predictably unacceptable" is baffling. Respondent was not seeking wage concessions, and it offered a modest wage increase each year of the agreement. Respondent is unaware of any legal support for General Counsel's position. *See ConAgra, Inc. v. NLRB,* 117 F.3d 1435, 1444 (DC Cir. 1997) (""Molinos' bargaining proposals were predictably a hard sell, but not so unreasonable as to have been predictably unacceptable; Molinos proposed to reduce wages and benefits significantly below their existing levels, but not below the levels at several of Molinos' competitors-including competitors represented by the same union.… Nor did Molinos categorically refuse to alter its proposals as the negotiations continued: One week after the parties began discussing the economic proposals, Molinos increased its proposed wages and benefits; two weeks later, Molinos improved its proposed medical coverage.")

That the increases offered were marginally lower than what was given non-unit employees is immaterial. There is no obligation to offer the same, and the unit employees were seeking the protection of a union contract, protection other employees did not enjoy, as well as additional benefits. *The B. F. Goodrich Co.,* 195 NLRB 914, 915 (1972) ("The Act does not impose upon an employer the obligation to grant or confer upon represented employees the right to receive such benefits solely on the basis that like benefits were conferred elsewhere").

As for the proposed backpay cap, Respondent repeatedly modified this proposal in an effort to ease the Union's fears. Aguirre testified, "Well, they probably made over ten. But you know, we would talk about it every time we met after that." (Tr. 564). The record reflects that

PDF created with pdfFactory trial version www.pdffactory.com

Respondent's parent company successfully negotiated lower backpay caps (120 days) with the Teamsters Union and the Operating Engineers. (Resp. Exhs. 21, 22, 23).

The General Counsel expended much energy attacking Respondent's 401(k) proposal. While the language in that proposal is hopelessly confused, the record is very clear that this language confusion was overlooked and unintentional. Respondent's proposal at all times included continuation of the existing 401(k) plan. When Respondent reviewed its final offer with the employees on November 14, the summary it used specifically indicated that the 401(k) would continue unchanged. Interestingly, Aguirre testified that this was not a big issue to the Union as few employees utilized the plan. (Tr. 670-671). There simply is no evidence that Respondent acted in bad faith. *Commercial Candy Vending Division,* 294 NLRB 908, 909 (1988) (mistaken failure to include dues checkoff in final offer not indicative of bad faith). Aguirre's uncorroborated testimony stands alone to the contrary and is not credible. The General Counsel's failure to call Juan De La Torre to corroborate Aguirre on this point is glaringly significant. Here, as the ALJ stated with Board approval in *I. Bahcall Steel & Pipe Co.,* 287 NLRB 1257, 1262 (1988), "Although the General Counsel contends that all these Respondent proposals were 'predictably unacceptable', the record shows that these were fundamental items, very important to the basic positions of both parties. I cannot conclude that by maintaining and adhering to its position on them, Respondent violated the Act."

The ALJ properly dismissed the General Counsel's surface bargaining allegations.

B. RESPONDENT DID NOT FAIL TO RECALL ECONOMIC STRIKERS

Respondent agrees with the General Counsel that the ALJ erred in failing to address the economic striker recall issues. The strike was not an unfair labor practice strike, and the General Counsel's alternative allegations should have been addressed. The proper course of action,

PDF created with pdfFactory trial version www.pdffactory.com

however, is to remand the case to the ALJ to make initial findings on these allegations, rather than for the Board to undertake in the first instance the analysis. However, in the event that the Board chooses not to remand, but to address these allegations itself, the record fails to support the General Counsel's contentions.

The General Counsel does not take issue with the order in which strikers have been recalled, but only with the number that have been recalled. (Tr. 942-943).

1. Maintenance Unit

On November 20, the day before the strike, Respondent employed 34 maintenance employees, (Resp. Exh. 5), but only 33 were active as Juan Castillo was on a workers' compensation leave at the time. There were 26 maintenance employees who went on strike, and 8 who did not, if, as Respondent contends, Juan Castillo is not considered to be a striker. (GC Exh. 4).[1] During the strike Respondent hired 31 replacements for the maintenance unit. (Resp. Exh. 6). In addition, one mechanic transferred from a Waste Connections facility in Las Cruces into El Paso. (Resp. Exh. 13). However, 5 of the replacements in the maintenance unit terminated before the conclusion of the strike. (Resp. Exh. 7). Thus, as of December 4, the day the strike ended, there were 34 maintenance employees actively working. (Resp. Exh. 8).

On December 10, Sam Dominguez, a welder, terminated. This brought the number of active employees down to 33, the exact same number as before the strike. On January 8, 2008, upon learning that Juan Castillo had been released to return to work, Respondent sought to recall Castillo to work. (GC Exh 83). On January 14, 2008, Juan Sanchez, a truck washer, terminated. (Resp. Exh. 7). Striker Manuel Cordova was recalled and returned on February 4, 2008. (GC Exh. 80). In the meantime, Castillo rejected recall and was terminated effective March 10, 2008.

[1] The parties stipulated that Eduardo Holguin should have been listed in the maintenance unit.

PDF created with pdfFactory trial version www.pdffactory.com

(GC Exhs. 84, 85, 86). On April 10, 2008, mechanic Alex Hernandez terminated, and on April 28, 2008 mechanic John Gonzalez terminated. (Resp. Exh. 7). On May 7, 2008, Respondent offered strikers Manuel Ramirez and Feliz Arteaga recall to the positions vacated by Hernandez and Gonzalez. (Resp. Exh. 81). Both accepted the offer and returned on May 19 and 26 respectively. (Resp. Exh. 80).

2. Drivers Unit

On November 20, the day before the strike, Respondent employed 65 drivers. (Resp. Exh. 5). There were 29 drivers who went on strike, and 36 drivers who continued to work. (GC Exh. 4).[2] During the strike Respondent hired 41 replacements for the drivers unit due to anticipated turnover and inefficiencies. (Resp. Exh. 6). However, 2 of the replacements for the drivers unit terminated before the conclusion of the strike. (Resp. Exh. 7). Thus, as of December 4, the day the strike ended, there were 75 employees actively working in the drivers unit. (Resp. Exh. 8).

The Second Consolidated Complaint, as amended, does not allege that Respondent hired extra drivers in order to interfere with strikers' recall rights. Further, the record evidence overwhelmingly demonstrates, as Respondent knew would be the case, that the new drivers were far less productive than the strikers and that additional drivers were necessary to service the routes as the new drivers learned both the routes and the nuances of operating the trucks. Armando Lopez testified:

> The minutes per container is in my opinion probably the best measurement for us to evaluate a driver and his productivity. The less minutes per container it takes for a driver to pick up one container, dump it and get to the next container -- that includes all driving time, all pretrip, post trip, fueling, landfill time, all overhead time, and that equates to his minutes per container.

[2] The parties stipulated that Eduardo Holguin should have been listed in the maintenance unit. However, GC Exh. 8 inadvertently omits Willie Gomez, Jr. (see GC Exh. 82).

PDF created with pdfFactory trial version www.pdffactory.com

(Tr. 970).

Thus, in the first ten months of 2007, Respondent's front load drivers averaged 4.26 minutes/container, or 14.1 containers per driver hour. In December, with the replacement drivers, this figure jumped to 5.32 minutes per container, or 11.3 containers per driver hour. That equates to a 19.9% decline in productivity. In January, February, and March 2008, the front load drivers averaged 4.88 minutes per container, or 12.3 containers per driver hour. This represented an improvement of 8.8% over December, but still 12.8% less than pre-strike 2007. In April, May, and June 2008, the front load drivers averaged 4.63 minutes per container, or 13.0 containers per driver hour. In July 2008, the front load drivers averaged 4.23 minutes per container, or 14.2 containers per driver hour. (GC Exh. 109).

George Wayne testified that Respondent also experienced a decline in business in 2008 from what had been projected. Wayne explained:

> The number of pulls that the budget was set on for roll off, which is construction type business, the large bathtub style containers that are at primarily construction business, and a lot of manufacturing businesses, for them to throw away stuff.
>
> The other thing that is pulled by roll offs are compactor boxes. The amount that was budgeted, we track each day, the number of daily pulls. And we watch it every day. We have a certain amount that was budgeted. And then we track it every day.
>
> So for example, for June, the amount that was budgeted was about 112 pulls --- landfill pulls per day. The actual at the end of June was 90.1 or 90.2 pulls per day average.
>
> The --- I remember specifically, the month of March was a little over 113 pulls per day budgeted. And we ended up at 99.7 or 8.
>
> JUDGE LITVACK: This is work from construction sites?
>
> THE WITNESS: It is not just construction sites. But that is a significant portion of that. Of that, is --- we have what is called permanent roll offs. And we have temporary roll offs. And so a permanent one would be at a

PDF created with pdfFactory trial version www.pdffactory.com

site that --- let's say like a manufacturing facility, Your Honor. And so it is there all the time. It gets pulled when it's full.

A temporary is --- it's not expected --- it's there for a duration that may be tied to a construction job, exactly.

JUDGE LITVACK: All right. Are you saying that the type of construction work that you normally would have pulled from in the past, has decreased?

THE WITNESS: Well, yes. And in our budgeting process, we look at the jobs that are going on, the jobs that are planned and expected, and we try to forecast out through the year. Based off of all the information that is available, based off of the fact that we have sales people that work directly with the major contractors in town, there has been a lot of construction on the military base. And so there was an expectation of the amount of construction and jobs that would be going on there.

And so all of those things are built into the budget. And then the empirical daily facts and monthly facts is that those number of pulls have not come about for us to do.

Now, it could be for two reasons. One is more competition. And the other is that the jobs are --- you know, jobs have either finished or delayed or haven't started up.

There is a number of major jobs that should have already started out on the base, that have been put off because of funding cycles or other reasons. And they just --- they are just not there.

And so those generate a significant number of pulls. And those are very specific examples of the types of things that aren't there.

. . . .

Q BY MR. ROBERTS: All right. And what about front end --- the front end business?

A Well, in the front end business, what --- typically what happens in watching it over 15 years, is that if a person has a six yard container that is serviced say four times a week, they typically don't make too many changes on that. Because, you know, one day it might be full. The next day it might be three-fourths full, another day it might be overflowing. And so they don't make a lot of changes to the size or the frequency of service.

PDF created with pdfFactory trial version www.pdffactory.com

When there is a sustained period of time where their business is down, or when you get to a point where people begin to look at we've got a lot of rising costs here, how do I make my business --- you know, have a better bottom line, then we start seeing people calling in and talking to the sales people about hey, I've got to find a way to cut down on my expenses.

And if my --- if, for example --- I'll give you and example of a dress store not doing as many sales. That means that they don't get as many boxes and containers and that stuff to throw away. And they might look at that and say ---

. . . .

THE WITNESS: And so the person would say, you know, I am not filling it up. So I want to cut back. Instead of picking me up four times a week, pick me up two times a week or three times a week, or whatever.

JUDGE LITVACK: And so are you finding --- what have you found during 2008 with regard to your customer business?

THE WITNESS: We have had reductions in the frequency of service, and also size of service. That is the other thing that happens. They --- and all that ends up affecting two things. One, your revenue, and then also the --- you may not need to have as much time out on the route to pick up, if you're not picking it up as often.

So you might have the same customer. But you are picking it up less frequently, or picking up less volume.

JUDGE LITVACK: Is that what you've found?

THE WITNESS: Yes. That is what we've found for the first six months of the year.

Q BY MR. ROBERTS: And do you know about how much decline you've seen in that front end business, just from the first of the year to June of this year?

A Uh, it is over $100,000.00, about 100 and some thousand dollars.

Q And what impact if any, has these --- the situation that you've described, had on your need for recalling drivers or mechanics as the year has gone by?

A Well, yeah. If you have less ---

PDF created with pdfFactory trial version www.pdffactory.com

> JUDGE LITVACK: Well, first of all, have you laid off any drivers or mechanics?
>
> THE WITNESS: We have not.
>
> JUDGE LITVACK: Okay.
>
> THE WITNESS: You know, the --- when you have less business and you are paying your people by the --- you know, on an incentive basis by the pull, you know, you want to give them as much work as they can do within a --- you know, a proper, legal and safe time frame. And so we have less work to be done by either the same or fewer number of people.

(Tr. 1195-1201).

Between December 5 and July 17, 2008, when the hearing concluded, 13 drivers terminated (Marco Salazar on December 5, Paul Moreno and Martin Gonzalez on December 11, Fernando Gomez on December 26, Daniel Moreno on January 16, Raul Arispe on January 23, Arturo Guajardo on January 30, Abraham Cruz on February 8, Larria Scott on March 14, Jorge Diaz on March 26, Isaac Soto on April 23, Tomas Armendariz on May 5, and Gerardo Vasquez on May 5, 2008). (Resp. Exh. 7). [However, Fernando Gomez was an unreinstated striker who submitted his voluntary resignation.] On April 16, 2008, Respondent offered Rafael Hernandez recall. (GC Exh. 81). Hernandez accepted and returned on April 23, 2008. (GC Exh. 80). On May 7, 2008, Respondent offered Miguel Rascon recall, and he returned on May 14, 2008. (GC Exhs. 80, 81). On May 22, 2008, Respondent offered Francisco Cazares recall, which he accepted. (GC Exhs. 80, 81).

3. ARGUMENT

"Under *Laidlaw*, an economic striker's entitlement to reinstatement is contingent upon the existence of a job vacancy," and it "is the General Counsel's burden to establish the existence of a *Laidlaw* vacancy." *Pirelli Cable Corp.,* 331 NLRB 1538 (2000). The General Counsel must also show the "extent of the violation," i.e., specific *Laidlaw* vacancies that were not filled by

PDF created with pdfFactory trial version www.pdffactory.com

recalling strikers. *Id.* This is not a compliance matter. *See Sproule Construction Co.,* 350 NLRB No. 65 (2007) (in failure to hire case, the General Counsel must prove the vacancies at the unfair labor practice hearing; "proof of the vacancies cannot be deferred until the compliance stage of the proceeding").

In *Laidlaw Corporation*, 171 NLRB 1366, 1369-1370 (1968), the Board held that:

> economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements, unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

A *Laidlaw* vacancy is not necessarily created every time a permanent replacement leaves or the post-strike employee complement falls below the pre-strike employee complement. As noted above, the employer may attempt to show that there was no business need to recall employees. In *Randall Burkart/Randall, Division of Textron, Inc.,* 257 NLRB 1 (1981), although the normal employee complement of employees numbered 400 and the employer only had 360 employees after the strike ended, it did not recall strikers in significant numbers until four months later. Nevertheless, the Board found no violation because the employer established business justification. The ALJ, with Board approval, explained:

> The principal argument of Respondent is that, as previously set forth, it was required by its customers, during an annual period which encompassed the termination of a collective-bargaining agreement, to build up an inventory of finished goods to a level which would carry it through at least a 30-day period should a work stoppage occur. Because of such inventory buildup the production requirements of Respondent following the strike were such as to not require the hiring of a substantial number of additional employees until February 1978.
>
> In light of the foregoing evidence of business justification, which is unrefuted on the record, I find that Respondent met its burden of establishing the defense that a substantial number of unreinstated strikers

PDF created with pdfFactory trial version www.pdffactory.com

> was not required for its production immediately upon termination of the strike, and strikers were recalled as needed when production schedules rose following the commencement of calendar year 1978.

Id. at 6-7.

In the maintenance unit, there were 33 active employees and 1 inactive employee (Juan Castillo) immediately preceding the strike. On December 4, the day the strike ended, there were 34 active employees and 1 inactive employee (Juan Castillo). When strike replacement Sam Dominguez terminated on December 10, the post-strike employee complement precisely matched the pre-strike employee complement, and there was no business need to recall a striker. This did not constitute a *Laidlaw* vacancy. Thereafter, every time a permanent replacement departed, a striker was recalled. Thus, no violations have been established in the recall of maintenance employees.

In the drivers unit there were 65 employees immediately preceding the strike and 75 employees working when the strike ended. The Second Consolidated Complaint, as amended, does not allege that Respondent hired excess drivers in order to forestall recall of strikers, and the record affirmatively establishes substantial business justification for the additional drivers. Not only did Respondent anticipate turnover and inefficiencies with the untrained new drivers[3], but the Company had budgeted for 5 new drivers in 2008. *See Kurz-Kasch, Inc.,* 286 NLRB 1343, 1358 (1987) (manager credibly "testified that he knew from experience that new employees would not be as efficient as those they replaced"); *Atlantic Creosoting Co.,* 242 NLRB 192, 194 (1979) ("Respondent lawfully hired 'surplus' laborers in expectation of an initially high attrition rate").

[3] As business declined, these 5 additional positions became unnecessary.

PDF created with pdfFactory trial version www.pdffactory.com

Respondent's drivers historically have been scheduled for 11 hours per day or 55 hours per week. In October, the month preceding the strike, the front load drivers averaged 4.09 minutes per container, or 14.66 containers per hour. In a 55-hour week, the average driver picked up 806 containers per week or 3,518 containers per month (14.66 x 240 hours). Thus, it took 2.8 drivers to pick up 10,000 containers. In December, with the replacement drivers, this figure jumped to 5.32 minutes per container, or 11.3 containers per driver hour. In a 55-hour week, the average driver picked up 622 containers per week or 2712 containers per month. Thus, in December, it took 3.7 drivers to pick up 10,000 containers. With the number of containers per month averaging in excess of 90,000, Respondent needed approximately 8 extra front load drivers in December (0.9 x 9) to do the same amount of work done in October.

With respect to the roll-off drivers, the number of pulls is based upon the volume of business, and the number of hours per pull is a reflection of the productivity of the drivers. In the first 10 months of 2007, the roll-off drivers averaged 1.73 hours per pull. Based on a normal schedule of 55 hours per week and 240 hours per month, an average driver made 139 pulls in October. In December, with the new drivers, this figure increased to 1.99 hours per pull. Using the standard 240-hour month, the average driver in December made 121 pulls. Thus, whereas 3.6 drivers could make 500 pulls in October, it took 4.1 drivers to make 500 pulls in December. With the number of pulls per month exceeding 2,000, (0.5 x 4) at least 2 extra roll-off drivers were needed in December.

Using empirical data, it is clear that the 10 extra drivers hired by Respondent were necessary in December to keep up with the work load. There is no evidence that these drivers were sitting around doing nothing. They were learning routes and how to operate the equipment.

PDF created with pdfFactory trial version www.pdffactory.com

There have been 12 active drivers[4] terminated since December 4, and 3 strikers have been recalled. Thus, the total active complement of drivers has never dropped below pre-strike levels. As of May 23, 2008, there were 65 active drivers, precisely the number of drivers immediately prior to the strike. (GC Exh. 79).

The record reflects that as terminations were occurring, two things were happening that obviated any need to recall drivers. First, efficiencies were increasing steadily. Second, volume was declining steadily, particularly in the roll-off business.

In January, February, and March 2008, the front load drivers averaged 4.88 minutes per container, or 12.3 containers per driver hour, or 2,952 containers per month. This represented an improvement of 8.8% over December. Based on the established normal schedule of 55 hours per week and 240 hours per month, it took 3.4 drivers to do 10,000 containers in January, February, and March. With volumes averaging over 90,000 containers per month, this equates to 2.7 fewer front load drivers needed than in December.

In April, May, and June 2008, the front load drivers averaged 4.63 minutes per container, or 13.0 containers per driver hour, or 3,120 containers per month. (GC Exh. 109). Based on the established normal schedule of 55 hours per week and 240 hours per month, it took 3.2 drivers to do 10,000 containers in April, May, and June. With volumes averaging over 90,000 containers per month, this equates to 1.8 fewer front load drivers needed than in the first quarter of the year.

Thus, based strictly on increased productivity, 4.5 fewer front load drivers were needed in June than in December. In the roll-off department, at the same time that productivity was improving, volumes were declining, from 2,506 pulls in January to 2,100 pulls in June 2008. As a result, the total number of driver hours to complete the work declined dramatically in 2008

[4] Fernando Gomez, a striker, resigned effective December 26. Thus, Respondent's Exhibit 7 reflects 13 total terminations.

PDF created with pdfFactory trial version www.pdffactory.com

from 5,029 in January to 4,011 in June. (GC Exh. 109). A decline of 1,000 hours per month is equivalent to 4.2 fewer drivers needed (1,000/240 hours) in June than in January 2008.

The simple fact is that Respondent has recalled drivers as its business needs warranted. There have been no more than 3 *Laidlaw* vacancies, all of which have been filled by recalling strikers. Respondent requests that these allegations be dismissed.

C. RESPONDENT DID NOT UNLAWFULLY TERMINATE JUAN CASTILLO

The General Counsel contends that the ALJ erred in not finding that Respondent unlawfully discharged Juan Castillo. This contention is without merit and should be rejected.

Juan Castillo was a member of the Union bargaining committee, but was on workers' compensation leave at the time of the strike. He did not testify during this proceeding. On January 8, 2008, following receipt of a full release for Castillo to work, Gracie Silva wrote Castillo offering him a position as a welder at the same pay and benefits. (GC Exh. 83). On February 5, 2008, Silva wrote Castillo again, noting that he had failed to respond to her previous letter and asking that he respond within 72 hours of receipt. (GC Exh. 84). One month later, by letter dated March 5, 2008, Castillo rejected the offer and asserted that Mike Olivas had told him he had been permanently replaced. (GC Exh. 85). On March 24, 2008, Silva sent Castillo a letter terminating his employment effective March 10, 2008. (GC Exh. 86).

In an e-mail dated March 10, 2008, Olivas stated that Castillo had come in to get his tools and had asked Olivas if he was fired. Olivas responded that he was not fired, but had been permanently replaced. (GC Exh. 87). General Counsel did not establish the date of this conversation between Olivas and Castillo.

George Wayne testified that the Company was uncertain as to whether Castillo was deemed a striker, that he sought legal advice, and that after receiving this advice, he concluded

PDF created with pdfFactory trial version www.pdffactory.com

that Castillo was incapable of withholding his services and could not be treated as a striker. (Tr. 1201-1202).

General Counsel does not challenge Castillo's termination of March 10, 2008 for rejecting a bona fide job offer. However, he contends that Olivas's earlier statement regarding permanent replacement constituted a termination. This contention is without merit.

To be sure, although Castillo clearly aligned himself with the strikers, because he was on workers' compensation leave at all times during the strike, he could not withhold his labor and could not be treated as a striker. *Pirelli Cable Corp. v. NLRB,* 141 F.3d 503, 522 (4th Cir. 1998). Although Olivas misspoke when he told Castillo he had been permanently replaced, he specifically told Castillo that he was not fired. And the correspondence between Silva and Castillo made it patently clear that Respondent had not only not discharged Castillo, but had a position ready and available for him. The pertinent legal standard is whether Castillo would reasonably believe from the circumstances he had been discharged. *The Grosvenor Resort,* 336 NLRB 613, 617 (2001). Castillo could not reasonably have believed he had been terminated. Respondent requests that this allegation be dismissed.

D. RESPONDENT DID NOT INTERFERE WITH RECALL RIGHTS

Respondent has taken exception to the ALJ's finding that Respondent violated the Act by instructing former strikers to report to the human resources department and sign a preferential recall list indicating their desire to be reinstated. The General Counsel has taken exception to the ALJ's failure to include this specific finding in the Conclusion of Law section of his decision. The Judge's finding of a violation, however, is erroneous. Thus, the General Counsel's cross-exception should be rejected.

PDF created with pdfFactory trial version www.pdffactory.com

On December 4, Aguirre sent Flora a letter making an unconditional offer to return on behalf of all the strikers. Aguirre requested that Flora let him know "when you require our services at your earliest convenience." (GC Exh. 48). Flora responded on December 5, noting that the strike was considered an economic strike, that permanent replacements had been hired, and that the "replaced economic strikers remain employees of EPD and are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantial equivalent employment." Flora requested that Aguirre "instruct the strikers to report to the HR department and sign the Preferential Recall List indicating their desire to be reinstated should a vacancy occur." (GC Exh. 49).

Aguirre expressed no problem with Flora's request. Adan Vasquez testified that it was his understanding that "the Union and Company had agreed on something that -- for them to hire us, if they had an opening, we needed to go sign the list at the Company, so that if they have an opening, they would call us back." It was the Union who told him to go and sign the list. (Tr. 849-850).

By letter dated December 10, Flora advised Aguirre that there were six strikers who had not signed the recall list. (GC Exh. 51). However, all of the strikers—whether or not they signed the list—have been placed on the recall roster being utilized by Respondent to recall strikers. (GC Exh. 82). The order in which strikers signed the list or the fact that some did not sign the list has had no impact on the order in which strikers are recalled.

An employer's request that returning strikers sign a recall list is not inherently unlawful. *See Poultry Packers, Inc.,* 237 NLRB 250, 251 (1978) ("On the day the strike ended, all strikers who desired to resume their employment were requested to sign a reemployment list"). However, it is a violation if "reinstatement was conditioned upon signing the form." *Presto Casting Co. v.*

PDF created with pdfFactory trial version www.pdffactory.com

NLRB, 708 F.2d 495, 498-499 (9th Cir. 1983); *see Pirelli Cable Corp.,* 331 NLRB 1538 (2000) ("the Respondent sent former strikers a letter requesting that they advise the Respondent of their desire and availability for reinstatement as a condition precedent to their placement on the preferential hiring list").

Here, the Union implicitly agreed with Respondent's request and it was the Union who directed, albeit at Respondent's request, the strikers to sign the list. In these circumstances, and given that Respondent has not utilized the signing or non-signing of the list as an excuse to discriminate, General Counsel has failed to establish a violation. Respondent requests that this allegation be dismissed.

E. THE REQUEST THAT BACKPAY SHOULD BE COMPOUNDED QUARTERLY IS WITHOUT MERIT

The General Counsel's request that the Board change its practice and compound interest on a quarterly basis should be rejected as the Board consistently has done in the past. The arguments raised by the General Counsel are not persuasive and fail to recognize that the Board's backpay practices are already more favorable to discriminatees than the practices employed by federal courts in employment discrimination cases. The Board calculates backpay on a quarterly basis thereby awarding a discriminatee backpay for all quarters in which she suffered losses, without any offset for quarters in which the discriminatee earned more than she would have with the employer. The federal courts, however, calculate backpay on the basis of the entire backpay period, and a discriminatee with losses in certain quarters has her backpay diminished to the extent she has greater earnings in other quarters. In these circumstances, compounding interest on a quarterly basis would be unfair.

PDF created with pdfFactory trial version www.pdffactory.com

CONCLUSION

Respondent respectfully requests that the Second Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 28th day of July 2009.

/s/ Charles P. Roberts III
Charles P. Roberts III

Constangy, Brooks & Smith, LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101
(336) 721-6852
(336) 748-9112 (facsimile)

Mark R. Flora
Constangy, Brooks & Smith, LLP
98 San Jacinto Boulevard
Suite 615
Austin, Texas 78701
(512) 382-8800
(512) 382-8801 (facsimile)

PDF created with pdfFactory trial version www.pdffactory.com

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Answering Brief has been served by electronic mail on the following parties:

John Giannopoulos
National Labor Relations Board – Region 28
2600 North Central Avenue
Suite 1800
Phoenix, AZ 85004-3009
John.Giannopoulos@nlrb.gov

Juan De La Torre
Business Representative
International Union of Operating Engineers,
Local 351, AFL-CIO
1200 Golden Key Circle, Suite 365
El Paso, TX 79925
juand351@yahoo.com

I certify that a copy of the foregoing Answering Brief has been served on the following party by federal express delivery and efforts have been made to notify by telephone:

Paul Urbina
654 Golden Eagle
Chaparral, NM 88081

This 28th day of July, 2009.

/s/ Charles P. Roberts III

Charles P. Roberts III

PDF created with pdfFactory trial version www.pdffactory.com